Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-24-474 OF 1998
KAMALANATHAN RATNAM J
31 MARCH 1999

Civil Procedure *— Injunction — Mandatory injunction — Application to set aside — Failure to make full and frank disclosure of material facts — Whether application should be allowed*

The plaintiffs obtained an interim mandatory injunction on an ex parte basis against the defendants. The defendants applied to set aside the ex parte order on the ground that the plaintiffs failed to make a full and frank disclosure of material facts. It was contended that the plaintiffs failed to disclose the terms and conditions of the agreements entered into by the parties.

Held, allowing the application:

A party moving the court ex parte for injunctive relief must make full and frank disclosure of material facts as required by O 29 r 1(2A) of the Rules of the High Court 1980. In the present case, the court found that the plaintiff had failed to make disclosure of very relevant matters in respect of the agreements between the parties (see p 694 H).

[Bahasa Malaysia summary

Plaintif telah mendapatkan injunksi mandatori interim atas dasar ex-parte terhadap defendan-defendan. Defendan-defendan telah memohon untuk mengketepikan perintah tersebut atas dasar bahawa plaintif-plaintif gagal untuk membuat pendedahan yang penuh dan ikhlas berkenaan fakta-fakta material. Adalah ditegaskan bahawa plaintif-plaintif telah gagal untuk mendedahkan terma-terma dan syarat-syarat bagi perjanjian-perjanjian yang dimasuki oleh pihak-pihak.

Diputuskan, membenarkan permohonan tersebut:

Sesuatu pihak yang memohon kepada mahkamah secara ex parte untuk relif injunksi mestilah membuat pendedahan yang penuh dan ikhlas mengenai fakta-fakta yang material seperti yang dikehendaki oleh A 29 k 1(2A) Kaedah-Kaedah Mahkamah Tinggi 1980. Di dalam kes ini, mahkamah telah mendapati bahawa plaintif telah gagal untuk membuat pendedahan mengenai perkara-perkara yang sangat berkaitan dengan perjanjian-perjanjian antara pihak-pihak tersebut (lihat ms 694H)].

A **Notes**

For cases on mandatory injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2243–2251.

Cases referred to

B *Brink's Mat Ltd v Elcomber* [1988] 1 WLR 1950 (refd)
Creative Furnishing Sdn Bhd v Wong Kol [1989] 2 MLJ 153 (refd)
Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd [1988] 3 All ER 197 (refd)
Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor C [1994] 1 MLJ 156 (refd)
Professor Dr A Kahar Bador & Ors v N. Krishnan & Ors [1983] 1 MLJ 407 (refd)
South Downs Packers Pty Ltd v Beaver [1984] SC (Qld) 8 ACLR 990 (refd)

D **Legislation referred to**

Rules of the High Court 1980 O 29 r 1(2A),(2B)

Conrad Young (*Azman Davidson & Co*) for the applicants
Wong Kian Kheong (*Andrew Chiew* with him) (*Lee Hishammuddin*) for E respondents

Kamalanathan Ratnam J: The third and fourth plaintiffs together with the three defendants were shareholders and directors of 34 companies ('the Meda Group'). The Meda Group included the first and second plaintiffs.

By eight in pari materia sale and purchase agreements dated 22 April F 1997, the third and fourth plaintiffs sold to the three defendants all the shares legally and beneficially owned by them in the Meda Group, including those shares in the first and second plaintiffs, for a total consideration of RM200 m, payable by four instalments.

So far as material to this application, it was a term of the said eight sale G and purchase agreements that the defendants were to become the legal and beneficial owners of the third and fourth plaintiffs' shares in the Meda Group upon payment of the second instalment.

The third and fourth plaintiffs further entered into a master agreement dated 22 April 1997 with the defendants wherein (so far as it is relevant to this application) it was agreed that the first and second plaintiffs were given H security for the payment of the second, third and fourth instalments payable by the defendants pursuant to the eight sale and purchase agreements.

It is not disputed that the defendants were unable to pay the third instalment under the sale and purchase agreements on the due date and that the third and fourth plaintiffs enforced their rights under the master I agreement and were appointed directors of the first and second plaintiffs on 2 May 1998.

The plaintiffs now allege that the defendants have failed and/or refused to return, inter alia, all files, documents, accounts and vehicles belonging to the first and second plaintiffs and have filed this originating summons against the defendants (encl 1) for conversion and detinue and for delivery-up of all files, documents, accounts and vehicles belonging to the first and second plaintiffs and for damages to be assessed on account of the alleged failure and/or refusal to deliver-up the same.

On 15 June 1998, the plaintiffs obtained an interim mandatory injunction on an ex parte basis which has essentially given them the full relief they seek in so far as delivery-up is concerned.

The issue

Whilst a holding-over injunction has since been granted inter partes pending the disposal of the plaintiffs' inter partes application for a interlocutory injunction (which is pending hearing), the application now before the court (encl 25) is the defendants' application to set aside the ex parte order itself.

Case for the defendants

The defendants sought to set aside the ex parte order on two grounds:

(1) That there was a failure on the part of the plaintiffs to make a full and frank disclosure of material facts.

(2) The lack of clean hands in approaching the court for ex parte relief.

Case for the plaintiffs

The plaintiffs contended that the defendants would destroy the various documents, files, books, etc., of the first and second plaintiffs. The plaintiffs also alleged deceit and dishonesty on the part of the defendants in their dealings with the first and second plaintiffs whilst the defendants were in control of those companies.

Findings of the court

Ex parte applications

It is clear that a party moving the court ex parte for injunctive relief must make full and frank disclosure of all material facts. This view is reflected lucidly in the judgment of Mohd Azmi SCJ in *Creative Furnishing Sdn Bhd v Wong Kol* [1989] 2 MLJ 153 at p 155 where his lordship said:

> Further, in presenting affidavit evidence to establish the necessary ingredients for an ex parte order for a Mareva injunction, it is incumbent on the applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so as the crucial time of making the ex parte application would invariably be fatal.

A 'Material Facts'

What then is 'material facts'. In *Professor Dr A Kahar Bador & Ors v N. Krishnan & Ors* [1983] 1 MLJ 407, Hashim Yeop A Sani J (as he then was) said that the suppression of a material fact must be of such a character as to mislead the court or if the true picture was presented the court would B probably not have granted the injunction. This was an application to set aside an ex parte order. In *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 Edgar Joseph Jr SCJ sitting as a High Court judge relied on the words of Sir Nicolas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197 at p 199 which quote:

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> I will deal first with the application to set aside the ex parte order. It is a basic principle applicable to all ex parte applications that a plaintiff seeking ex parte relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the ex parte injunction on that ground alone. But if, in the circumstances existing when the D matter comes before the court inter partes, justice requires an order either continuing the ex parte injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex parte order obtained without due disclosure set aside: *there is a discretion in the court* E *whether to do so or not.* (Emphasis added.)

In *Noor Jahan*, the learned judge held that having considered the matter he was not prepared to hold that if a full and true picture had been disclosed to the court in the first place he would not have granted the interlocutory injunction.

F However, it must be noted that *Noor Jahan* was decided prior to the introduction of O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC') which now limits the life span of an ex parte injunction to two weeks only. Any further injunction will have to be obtained by making a fresh application heard inter partes. Prior to the introduction of O 29 r 1(2B) of G the RHC an ex parte injunction continued until trial (or up to such expressed period) if not set aside earlier. Therefore, where upon an application to set aside the order, if the court found that there was a material non-disclosure justifying a setting aside of the ex parte injunction but nevertheless, on looking at all the material then before the court (including the evidence not previously disclosed at the ex parte stage) the court found H that the justice of the case so required the continuation of the order, the court might order a continuation of the injunction despite the previous material non-disclosure. In fact, this was the prevalent view and in *Brink's Mat Ltd v Elcomber* [1988] 1 WLR 1950, the Court of Appeal said that the borderline between material and non-material facts may be a somewhat uncertain one. It went on to hold further that whilst in no way discounting I the heavy duty of candour and care which falls on persons making ex parte applications, the application of the principle should not be carried to extreme lengths.

From these cases and more so from the decision in *Brink's Mat* it can be gathered that the principles applicable to a non-disclosure case is that the court will first decide whether there was material non- disclosure justifying a setting aside of the ex parte order. As said by Ralph Gibson LJ at p 1356 'the material facts are those which it is material for the judge to know in dealing with the application as made'. Only then does the discretion arise to nonetheless continue the ex parte injunction or to set it aside and grant a fresh injunction. The discretion to continue the ex parte injunction only arises because there is a discretion to grant a fresh one. In the circumstances, when the need to exercise this discretion arises it will be governed by whether the non-disclosure was innocent and whether the injunction would have been granted if the non-disclosed facts had indeed been disclosed.

However, it is my judgment that this discretion does not now arise in the light of O 29 r 1(2B) of the RHC. The effect of this amendment to O 29 is that the court will look purely as to whether there has been a non-disclosure of material facts in line with the decision in *Creative Furnishing*. The earlier principle that whether in all the facts now before the court including the previously non-disclosed facts the court might be minded to grant the injunction is no longer of relevance. That to my mind, would become relevant only when it comes to the plaintiffs' inter partes application for an interlocutory injunctlon. This was the approach I adopted in *Larut Consolidated Bhd & Anor v Khoo Fe Bee & Ors* [1997] 4 MLJ 77. This is what I said at p 97:

> ... Order 29 r 2A of the RHC 1980 was introduced for a specific purpose and with specific reference to ex parte applications. The need for full and frank disclosure at the ex parte stage has now been enshrined in the rules. Such rules cannot be treated as mere pedantic verbiage. They must be strictly compiled with by the parties and enforced by the court. It is my finding that the plaintiffs had indeed breached this rule.

There again I relied on *Creative Furnishing* and set aside the ex parte order. However, considering all matters, I granted a fresh injunction in the inter partes application. To my mind, the requirements of full and frank disclosure in ex parte applications has now been enshrined in O 29 r 1(2A) of the RHC. Learned counsel for the plaintiffs argues that since the duration of any ex parte injunction is now limited to only 14 days and that the plaintiffs have to apply within the 14 days from the date of the ex parte order for an inter partes order, this meant that any possible injustice arising from any ex parte injunction obtained by concealment of material facts is now limited to a 14-day period. As such, counsel argued there need not be such a high standard of disclosure. All that was required was for the plaintiffs to disclose all material facts which might influence the court in deciding whether to grant the ex parte order or not. The fallacy in this argument is apparent. It allows for the plaintiffs to make selective disclosures and do any mischief they can within the 14 days. This cannot be what is envisaged by a court of equity. It is also to be noted that there is no equivalent to O 29 r 1(2B) in England, Australia or Singapore whether as

rules or as practice directions. It is therefore important to be careful in relying on authorities from those jurisdictions and the pre O 29 r 1(2B) in so far as it concerns the point regarding the further discretion to continue the ex parte injunction.

Were there any material non-disclosures?

In *Brink's Mat,* the court held that the material facts are those which is material for the judge to know in dealing with the application as made and that the materiality is to be decided by the court and not based on the assessment of the applicant or his legal advisers. It must also be clearly borne in mind that whether there is a non-disclosure of a material fact or not in a particular case, is a question of fact (see *South Downs Packers Pty Ltd v Beaver* [1984] SC (Qld) 8 ACLR 990. In the circumstances, cases on material non- disclosure are not binding precedents of law but are merely illustrative of this general principle that it is incumbent on the plaintiff to disclose material facts.

The turnkey contract and the supplemental agreement

There is no dispute that at the time the turnkey contract was entered into on 15 May 1995 by the first plaintiff with one Meda Property Services Sdn Bhd ('MPS') the third and fourth plaintiffs, together with the three defendants were all shareholders and directors of both the first and second plaintiffs and as such had full knowledge of the same. In their ex parte application, the plaintiffs alleged deceit and deception on the part of the defendants in entering into the supplemental agreement dated 5 January 1998 between the first plaintiff and MPS when the defendants were in control of the first defendant. It is clear that the supplemental agreement essentially records the agreement reached in respect of variations to the works done by MPS for the first plaintiff whereby it was also agreed that in consideration thereof an additional sum of RM61,560,740 was payable to MPS.

By their evidence, the plaintiffs contended that this was not done in the ordinary course of business, thus implying that the defendants were enriching MPS at the expense of the first plaintiff which was one of the securities given in the master agreement. On this basis the plaintiffs argued in the ex parte application that there was every risk that the defendants might destroy documents to cover their tracks.

The plaintiffs failed to disclose the fact that by the terms of the turnkey contract, MPS was to implement and carry out the first plaintiff's only project which included the obtaining of necessary approvals, procuring bridging and end-financing, co-ordinating sales to end purchases, sales management, administration, billings, collection of payments, etc. In the circumstances, MPS had every right to be in possession and custody of all operational documents relating to the first plaintiff's project in order to carry out their obligations. It is also a material fact that at the time of instituting this action on 3 June 1998 and at the time the ex parte summons

was filed on 4 June 1998 the first plaintiff had not as yet terminated MPS as the turnkey contractor. The termination was on 12 June 1998 although its effectiveness is being challenged.

The defendants had set out the reasons for entering into the supplemental agreement. This was due to delays due to late approvals by the authorities, by changes in design and layout, by changes from hostel units to high cost units, by changes to specifications and designs of the terrace factories. Since these changes had effective cost implications, there was a need to increase the costs and thus the need for a supplemental agreement. It is also of significance to note that whilst the plaintiffs lament over the increased costs due to delay, there was already delay when the third and fourth plaintiffs were all part of the Meda Group and they were therefore aware of the delay. The plaintiffs also objected to the fact that the supplemental agreement allowed for extension of time to complete the works. But there is evidence that these extensions were already agreed to by 8 October 1996 well before the third and fourth plaintiffs left the Meda Group. In fact, the same extended completion dates were reduced into cl 5 of the supplemental agreement.

It is clear therefore that whilst the plaintiffs fully knew the reasons behind the supplemental agreement yet they presented a picture of piety on their part whilst presenting the defendants as perpetrators of deceit and dishonesty.

The plaintiffs contend that the turnkey contract and supplemental agreement are not relevant to their cause of action in the tort of conversion and detinue which is the case before me. They also argue that since the defendants had in their application to strike out the writ also raised as one of their grounds, the right of MPS to possess the documents by virtue of the supplemental agreement, and since I had dismissed the defendants' application to strike out on 10 December 1998, the defendants are now estopped from raising this issue.

I do not accept this view. There were numerous issues raised in that earlier application. I merely gave an oral decision. There was no appeal against that decision. Since the non-disclosure by the plaintiffs of the terms and conditions of the turnkey contract and supplemental agreement struck at the very root of the first plaintiff's case in that it directly related to the question as to whether the first plaintiff had an immediate right to possession to the turnkey documents, I hold that the defendants are at liberty to raise the right of MPS to the documents as a specific issue in respect of this application.

In the light of my explicit finding that the plaintiffs had failed to make disclosure of very relevant matters in respect of the two agreements, I do not see the need for me to go into all other matters relating to non-disclosure.

The lack of clean hands

In the light of my earlier finding, it follows that the defendants must also succeed under this head.

A It has been shown that the fourth plaintiff has himself authorized a RM110,275 discount to a company where his relatives have interests on account of a purchase of property of the first plaintiff. This has not been denied by the plaintiffs.

Having read all the authorities of both parties I order that:

B (a) the ex parte order of this court dated 15 June 1998 be set aside;

(b) the plaintiffs do pay the defendants all damages howsoever suffered by the defendants arising from or as a consequence of the granting of the said order dated 15 June 1998;

(c) the deputy registrar do assess damages; and

C (d) the costs of this application be paid by the plaintiffs to the defendants.

Application allowed.

Reported by Jafisah Jaafar

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